ORIGINAL

(8)

No. 02-1603

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MARTIN HORN, Commissioner,
Pennsylvania Department of Corrections;
JAMES E. PRICE, Superintendent of the
State Correctional Institution at Greene;
RAYMOND COLLERAN, Superintendent
of the State Correctional Institution at
Waymart; COMMONWEALTH OF PENNSYLVANIA

Petitioners,

v.

GEORGE E. BANKS

Respondent,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

ALBERT J. FLORA, JR.
Counsel of Record
33 W. South Street
Wilkes-Barre, PA 18701
(570) 825-6592

WILLIAM RUZZO
Counsel of Record
33 W. South Street
Wilkes-Barre, PA 18701
(570) 825-6592

MOTION FOR LEAVE TO PROCEED INFORMA PAUPERIS

1. Respondent, George E. Banks, is in the custody of the Commonwealth of Pennsylvania incarcerated at the State Correctional Institution at Graterford under sentence of death and imprisonment.

2. Respondent has been continuously incarcerated since September 25, 1982, and has been without any gainful employment during that time. He has no other source of income.

3. Respondent has proceeded In Forma Pauperis throughout all State Court proceedings in this matter.

4. On March 26, 1999, the United States District Court for the Middle District of Pennsylvania granted Respondent's Application to Proceed In Forma Pauperis in connection with the filing of his petition for Writ of Habeas Corpus pursuant to 28 U.S.C. 2254 and for Stay of Execution.

5. On March 26, 1999, the United States District Court for the Middle District of Pennsylvania appointed undersigned counsel to represent Respondent in his Habeas Corpus proceedings pursuant to 21 U.S.C. 848(q)(B)(7),(8).

Accordingly, Respondent requests that this Court grant him leave to proceed In Forma Pauperis in connection with his Opposition to the Petition for Writ of Certiorari.

Albert J. Flora, Jr., Esq.
Counsel of Record
33 W. South Street
Wilkes-Barre, PA 18701
(570) 825-6592
Counsel for Respondent

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ALBERT J. FLORA, JR.
Counsel of Record
33 W. South Street
Wilkes-Barre, PA 18701
(570) 825-6592

WILLIAM RUZZO
Counsel of Record
33 W. South Street
Wilkes-Barre, PA 18701
(570) 825-6592

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I. COUNTERSTATEMENT OF THE CASE

In September 1982, Banks was arrested for killing thirteen people. Following extensive pretrial hearings that determined that Banks was competent to stand trial, a jury, rejecting Banks' insanity defense, convicted Banks of twelve counts of first degree murder and sentenced him to death on each of those counts. Eight months before this Court's decision in *Mills v. Maryland*, 486 U.S. 367 (1988), Banks' convictions and sentences of death were affirmed on direct appeal. *Commonwealth v. Banks*, 521 A.2d 1 (Pa. 1987), cert. denied, *Banks v. Pennsylvania*, 484 U.S. 873 (1987).

Banks subsequently sought state collateral relief asserting, for the first time, that the sentencing instructions violated *Mills v. Maryland*. The uniqueness of Pennsylvania's appellate review process allowed the *Mills* claim to be raised and determined on the merits under its "relaxed waiver doctrine". The Commonwealth did not assert that *Mills* was non-retroactive. The Pennsylvania Supreme Court determined that the sentencing instructions did not violate *Mills* and again affirmed the sentences of death. *Commonwealth v. Banks*, 656 A.2d 467 (1995), cert. denied, *Banks v. Pennsylvania*, 516 U.S. 835 (1995).

Banks then sought federal habeas relief. His petition was dismissed without prejudice so that he could pursue additional state remedies. *Banks v. Horn*, 126 F.3d 206 (3rd Cir. 1997). State collateral relief was again denied. *Commonwealth v. Banks*, 726 A.2d 374 (Pa. 1999). Banks then re-filed his federal habeas petition, which was denied on the merits by the district court. *Banks v. Horn*, 63 F.Supp. 2d 525 (M.D. Pa. 1999). On appeal, the Third Circuit reversed concluding that the Pennsylvania Supreme Court unreasonably applied *Mills*. In reaching this conclusion, the Third Circuit determined that the resolution of the retroactivity of *Mills* under *Teague v. Lane*, 489 U.S. 288 (1989) was unnecessary because the Pennsylvania Supreme Court itself considered and applied *Mills* (albeit unreasonably) on the merits. *Banks v. Horn*, 271 F.3d 527 (3rd Cir. 2001).

The Commonwealth then filed a petition for writ of certiorari. In granting the writ, this Court held that the Third Circuit must perform a *Teague* analysis before granting relief under *Mills*. This Court reversed and remanded for further proceedings. *Horn v. Banks*, 122 S.Ct. 2147 (2002). On remand, the Third Circuit concluded that *Mills* was not a "new rule" under *Teague*, and reinstated its previous ruling that the Pennsylvania Supreme Court unreasonably applied *Mills*. *Banks v. Horn*, 316 F.3d 228 (3rd Cir. 2003). In a concurring opinion, Judge Sloviter concluded that although *Mills* was a "new rule" under *Teague*, Banks conviction was not final within the meaning of *Teague* until after the denial of his first state collateral relief petition. Judge Sloviter reasoned that the collateral review process under which the Pennsylvania Supreme Court addressed *Mills* on the merits, as required by its unique "relaxed waiver doctrine", was another form of direct review. *Id.*, at 255 (Sloviter, J., concurring).

The Commonwealth of Pennsylvania has again sought review of this case by petition for writ of certiorari.

II. REASONS FOR DENIAL OF THE WRIT

1. THE THIRD CIRCUIT CORRECTLY HELD THAT MILLS WAS DICTATED BY EXISTING PRECEDENT

Mills did not announce a new rule under *Teague v. Lane*, 489 U.S. 288 (1989). The Third Circuit's decision that *Mills* was dictated by the "legal landscape" in place as of October 5, 1987, is firmly rooted in this Court's precedent, is well reasoned and should not be disturbed.

In *Furman v. Georgia*, 408 U.S. 238 (1972), this Court invalidated all death sentences then existing in the various states holding that the Eighth Amendment prohibited the death penalty from being imposed under procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner. Four years after *Furman*, this court began the process of considering whether the procedural mechanisms in death penalty statutes ensured that sentences of death would not be inflicted

arbitrarily. See, *Jurek v. Texas*, 428 U.S. 262 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976); and *Proffitt v. Florida*, 428 U.S. 242 (1976). In each of these cases, state death penalty statutes had survived Eighth Amendment attacks.

Eight months before *Mills v. Maryland*, 486 U.S. 367 (1988) was decided, this Court, on October 5, 1987, denied certiorari on direct appeal from the Pennsylvania Supreme Court's affirming of Banks' death sentences. *Banks v. Pennsylvania*, 484 U.S. 873 (1987).[1]

At the time of the denial of Banks' certiorari petition, this Court had decided an additional eight pre-*Mill's* cases, which continued the evolution of *Furman*. These cases created the constitutional framework which dictated *Mills*. These cases are, *Woodson v. North Carolina*, 428 U.S. 280 (1976), *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325 (1976), *Lockett v. Ohio*, 438 U.S. 586 (1978), *Eddings v. Oklahoma*, 455 U.S. 104 (1982), *Skipper v. South Carolina*, 476 U.S. 1 (1986), *California v. Brown*, 479 U.S. 538 (1987), *Hitchcock v. Dugger*, 481 U.S. 393 (1987), *McCleskey v. Kemp*, 481 U.S. 279 (1987). They embody the Eighth Amendment principle which prohibits government from erecting barriers prohibiting individual jurors giving consideration and effect to mitigating evidence of the character and record of an offender in a death penalty proceeding. In each of these cases, this Court continued *Furman* on its evolutionary path by embarking on a case-by-case analysis of the particular process employed to determine whether that process created a constitutionally impermissible barrier.

Mills is but a part of this evolutionary process. The impermissible barrier in *Mills* was a single juror's holdout vote on the existence of mitigating evidence. *Mills* removed this barrier. The pre-*Mills* line of cases dictated such a result. As this Court recognized in *Mills*, "Under our decision, it is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by

[1] The Commonwealth erroneously states that "Banks judgment became final in 1986". CP at 5. Under *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994), a conviction becomes final for Teague purposes when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely petition has been finally denied. Based upon this definition, Banks' conviction became final when this Court denied certiorari on October 5, 1987.

statute, *Lockett v. Ohio*, supra; *Hitchcock v. Dugger*, --U.S.--, 107 S.Ct. 1821, 95 L.Ed 2d 347 (1987); by the sentencing court, *Eddings v. Oklahoma*, supra; or by an evidentiary ruling, *Skipper v. South Carolina*, supra. The same must be true with respect to a single juror's holdout vote against finding the presence of a mitigating circumstance. Whatever the cause....the conclusion would necessarily be the same: 'Because the [sentencer's] failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of *Lockett*...'*Eddings v. Oklahoma*, 455 U.S., at 117, n.*, 102 S.Ct., at 878, n.* ((O'Conner, J., concurring)." *Mills*, 108 S.Ct., at 1866.

The general principle that a state cannot create, by whatever mechanism, barriers to jurors giving consideration and effect to mitigating evidence does not become new again with each particular impermissible barrier that may subsequently occur. The continued application of a rule that necessarily requires a case-by-case examination of the evidence does not create a new rule under *Teague*. *Williams v. Taylor*, 529 U.S. 362, 382 (2000); *Smith v. Robbins*, 120 S.Ct. 746 (2000). The continued application of the principle announced in the *Woodson-Dugger* line of cases requires a case–by-case examination of the particular evidence at issue to determine whether a constitutionally impermissible barrier exists. Contrary to the Commonwealth's assertion, this continued application does not continually create a "new rule".

The Commonwealth attempts to distinguish these pre-Mills cases by arguing that *Mills* addressed a different problem-"the question of unanimity and that *Mills* went beyond the principle that the jury must be allowed to consider mitigating evidence." CP at 9-10. This argument contradicts the very import and language of *Mills* .If the unanimity requirement of a jury instruction would prevent the jurors from giving due consideration and effect to mitigating evidence, then this requirement creates a barrier in violation of the Eighth Amendment. The source of the barrier is not the relevant consideration. *Mills*, 486 U.S. at 372-375. Furthermore, the Commonwealth's assertion that it is constitutionally permissible

to allow a jury to consider mitigating evidence but, because of a unanimity requirement, the jury could not give it effect in its sentencing decision is without support and has been consistently rejected by this court. See, *Saffle v. Parks*, 494 U.S. 484, 491 (1990) ("*Lockett* and *Eddings* command that the State must allow the jury to give effect to mitigating evidence in the making of a sentencing decision"); *Buchanan v. Angelone*, 522 U.S. 269, 276 (1998) ("Our consistent concern has been that restrictions on the jury's sentencing determination does not preclude the jury from being able to give effect to mitigating evidence." (citing *Lockett*, *Eddings*, *Penry*)).

This Court's *Teague* ruling in *Penry v. Lynaugh*, 492 U.S. 302 (1989), which challenged a conviction that became final on January 13, 1986, also supports the conclusion that *Mills* was dictated by precedent. Like Banks, the habeas petitioner in *Penry* challenged his death sentence on the ground that the jury instructions created a barrier, which precluded a jury from saying "no to the death penalty", based upon mitigating evidence of mental retardation and abused background. In relying on *Woodson*, *Lockett* and *Eddings*, this Court concluded that the rule that *Penry* sought to apply was not new under Teague.

Given this legal landscape, the Third Circuit was correct in concluding that *Mills* represented merely "an application of the well established constitutional rule that the Eighth Amendment prohibits all barriers to the sentencer's consideration of any and all mitigation evidence in the penalty phase of a capital trial." App. 16.

2. THE PENNSYLVANIA SUPREME COURT'S OWN VIEWS SUGGEST THAT MILLS IS BASED ON PRECEDENT

In a *Teague* analysis, the "reasonable views of state courts are entitled to consideration" as part of the legal landscape. *Caspari v. Bohlen*, 510 U.S. 383, 395 (1994). Pennsylvania' own history of capital jurisprudence prior to the State Supreme court's decision in *Banks* reflects adherence to the constitutional directive of the *Woodson-Lockett* line of cases.

In 1974, the Pennsylvania legislature enacted, in response to this Court's holding in *Furman*, a new death penalty statute. Act of March 26, 1974, P.L. 214, No. 46, 18 Pa. C.S.A. 1311. Three years after its enactment, the Pennsylvania Supreme Court found the statute to be unconstitutional because it prevented jurors from considering evidence pertaining to the individual character and history of the defendant. In reaching this conclusion, the state court relied on the general principle embodied in *Woodson*, *Jurek*, *Proffitt* and *Roberts* that a sentencing authority cannot be prohibited from considering mitigating evidence relevant to the character and background of a defendant. *Commonwealth v. Moody*, 476 Pa. 223, 231, 382 A.2d 442 (1977).

On September 13, 1978, the Pennsylvania legislature adopted a new sentencing procedure. 42 Pa. C.S.A. 9711. As the Pennsylvania Supreme Court subsequently noted in *Commonwealth v. Zettlemoyer*, 454 A.2d 937, 500 Pa. 16 (1982), cert. denied, 461 U.S. 970 (1983), this latest version of the sentencing code had responded to this Court's announcement in *Lockett* that a barrier could not be created which permitted only statutorily enumerated mitigating factors to be considered in a death penalty proceeding.

In 1995, when the Pennsylvania Supreme Court was faced on collateral review with Banks' *Mills* claim, it had the benefit of *Woodson*, *Lockett*, *Skipper*, *Eddings* and *Hitchcock*, and a history of capital jurisprudence reflecting some of this Court's pre-*Mills* cases. The State Court had applied the general principle under the *Woodson* and *Lockett* that barriers to the consideration of mitigating evidence are constitutionally impermissible under the Eight Amendment. Under these circumstances, the Pennsylvania Supreme Court's determination of the merits of Banks' *Mills* claim was the result of its own recognition that *Mills* is based upon constitutional precedent.[2]

[2] In *Commonwealth v. Cross*, 535 Pa. 603, 726 A.2d 333 (1999), the Pennsylvania Supreme court concluded without any analysis of *Eddings*, *Lockett* or *Hitchcock*, that *Mills* was a "new rule"; nevertheless the court addressed the merits of *Mills* concluding that there was no violation.

3. UNDER TEAGUE, THE FEDERAL HABEAS COURTS WERE CORRECT IN APPLYING MILLS BECAUSE THE PENNSYLVANIA SUPREME COURT HAD APPLIED MILLS

The Pennsylvania Supreme Court actually applied *Mills* in this case, albeit in a manner that the Third Circuit deemed objectively unreasonable. See, *Banks*. 656 A.2d at 470-72. Under a unique state appellate review process, where the state court has actually applied *Mills*, *Teague* allows the federal habeas court to also apply *Mills*.

Though recognizing that Banks' *Mills* claim was being raised for the first time on collateral review, the Pennsylvania Supreme Court nevertheless addressed the merits of this claim. The Pennsylvania courts approach was consistent with and dictated by its "relaxed waiver doctrine" first announced in *Commonwealth v. McKenna*, 476 Pa. 428, 440-441, 383 A.2d 174, 181 (1978). Under this state doctrine, which is predicated on *Woodson*, the standards by which a sentence of death is fixed must be constitutionally beyond reproach. Because the imposition of such a sentence is irrevocable in its finality, consideration of constitutional issues challenging the death penalty cannot be waived. This doctrine was designed "to prevent the court from being instrumental in an unconstitutional execution." *Commonwealth v. Albrecht*, 554 Pa. 31, 720 A.2d 693, 700 (1998).[3]

Teague is a doctrine of comity, which works in conjunction with the rule on exhaustion. The exhaustion rule "serves to minimize friction between our federal and state systems of justice by allowing the state an initial opportunity to pass upon and correct alleged violations of a prisoners' federal rights." *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981). Teague avoids the insult to state court judgments that would occur if the state courts (during the exhaustion process) "faithfully apply existing constitutional law only to have a federal court discover, during a habeas proceeding, new constitutional commands."

[3] In *Commonwealth v. Albrecht*, supra, the Pennsylvania Supreme Court decided that it would no longer apply the "relaxed waiver doctrine" in collateral review proceedings. Recently, in *Commonwealth v. Freeman*, 2003 WL 21255941 (Pa. May 30, 2003), the Pennsylvania Supreme Court adopted a new general rule, which abolished the "relaxed waiver doctrine" on direct appeal in capital cases unless the waived claim is of particular constitutional magnitude that it should be reached on appeal.

Teague, 489 U.S., at 310. Therefore, if *Mills* announced a new rule, *Teague* would preclude federal habeas courts from applying *Mills* if the claim had been litigated in the state court before *Mills* was decided.

In this case, the *Mills* claim was fully litigated in state court after *Mills* was decided, and the state court actually applied *Mills* to the claim. Since the state court had a full opportunity to and actually did apply *Mills* to this claim, comity is not offended by applying *Mills* in federal habeas review. Adoption of the Commonwealth's position would create a bizarre rule that would forbid a federal court from applying exactly the same precedent that was applied by the state court.

Concepts of finality are also not offended in retroactively applying *Mills* within the unique circumstances of this case, assuming *Mills* is a new rule. A state conviction and sentence becomes final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied. *Caspari*, 510 U.S., at 390. Although Banks' direct appeal had been technically exhausted, Pennsylvania's relaxed waiver doctrine effectively treats collateral relief petitions in the death penalty context like a direct appeal. Under these unique circumstances, Banks conviction was not final within the meaning of Teague until 1995 when the Pennsylvania Supreme Court affirmed the denial of his collateral relief petition and this Court denied his petition for writ of certiorari.[4] See, App. 52-57.

4. THE DECISIONS OF OTHER COURTS SUPPORT THE CONCLUSION THAT MILLS WAS DICTATED BY PRECEDENT

In *Gall v. Parker*, 231 F.3d 265, 322-23 (6th Cir. 2001), the Sixth Circuit held that *Mills* was not a "new rule" and could be applied retroactively to a conviction that became final in 1981. *Gall* reasoned that *Lockett* dictated *Mills*.

[4] In light of the Pennsylvania Supreme Court's recent decision in Commonwealth v. Albrecht, supra, this unique situation is unlikely to reoccur.

In *Hopkinson v. Shillinger*, 781 F.Supp..737 (D. Wyo. 1991), *aff'd*, 954 F.2d 609 (10th Cir. 1992), the district court reasoned that *Mills* did not announce a new rule for a conviction that became final after *Lockett* and *Eddings*; "the Eighth Amendment prohibits barriers to consideration of mitigating evidence whether they result from evidentiary rulings, statute or jury instructions....*Mills* and *McKoy* are simply different factual applications of that established principle and are applicable here." *Hopkinson*, 781 F.Supp. at 742.

DeShields v. Snyder, 829 F.Supp. 676 (D. Del (1993), held that "the rule announced in *Mills* is not a new rule within the meaning of Teague as the result was dictated by *Lockett* and *Eddings*.

5. DECISIONS THAT HAVE DEEMED MILLS "NEW" ARE DEVOID OF REASONING AND DISTINGUISHABLE

The Commonwealth relies on *Miller v. Lockhart*, 65 F.3d 676, 685-86 (8th Cir. 1995), *Cordova v. Collins*, 953 F.2d 167, 173 (5th Cir. 1992) and *Williams v. Dixon*, 961 F.2d 448, 456 (4th Cir. 1992) for its position that the Circuits are split as to whether *Mills* constitutes a "new rule" for *Teague* purposes. CP at 5-6.

In *Cordova*, the Fifth Circuit provided no rationale whatsoever for its conclusion that *Mills* announced a new rule. *Cordova*, 953 F.2d at 173. Similarly, *Miller* offers little rationale for its holding. In *Miller*, the petitioner's conviction became final in 1981, so only the plurality opinion in *Lockett* was part of the relevant legal landscape for *Teague* purposes. In comparison, Banks had the benefit of *Eddings*, *Skipper* and *Hitchcock*, which together with *Lockett*, formed the basis for *Mills*.

Contrary to the Commonwealth's assertion, *Williams* did not conclude that *Mills* announced a "new rule". Rather the *Williams* court concluded that *Mills* fit within the second *Teague* exception. *Williams* did note that a previous Fourth Circuit panel, *McDougal v. Dixon*, 921 F.2d 518, 539 (4th cir. 1990) had indicated in dicta that *Mills* was "new", but *Williams* did not adopt that statement. *Williams*,

961 F.2d at 453 n.3; *Banks*, 316 F.3d at 246 n. 15. *McDougal* itself contains no analysis but simply notes that *Mills* was decided eight years after petitioner's conviction.

Pennsylvania's capital appeals process under which the *Mills* claim was decided is unique and distinguishable from the procedures utilized in the cases relied upon by the Commonwealth. The Commonwealth failed to address this uniqueness. The very meaning of "finality" for *Teague* purposes takes a very different turn in Pennsylvania as opposed to the other circuit decisions cited by the Commonwealth. Because of this difference, the split suggested by the Commonwealth is not applicable to this case.

6. THE THIRD CIRCUIT WAS CORRECT IN ITS DECISION THAT THE PENNSYLVANIA SUPREME COURT'S REJECTION OF THE MILLS CLAIM WAS UNREASONABLE

Under 28 U.S.C. 2254 (d) (1) a federal writ can be granted only if a state court decision "was contrary to, or involved an unreasonable application of clearly established precedent of this court". In *Wiggins v. Smith*, 2003 WL 21467222 (U.S. 2003), this Court concluded that the unreasonable application prong of section 2254 (d) (1) permits a writ to be granted when the state court identifies the correct governing legal principle but unreasonably applies it to the facts of petitioners case. The state court decision must be objectively unreasonable, not just incorrect or erroneous.

In its 2001 opinion, the Third Circuit had concluded that the Pennsylvania Supreme Court had unreasonably applied Mills in determining whether the jury instructions and verdict slip violated the Eighth Amendment. App. 115, 119. This Court did not grant certiorari on this issue, which was also raised by the Commonwealth in its original petition. In its 2003 opinion, the Third Circuit reinstated this conclusion and its analysis. App. 38. The Commonwealth again seeks review of this conclusion.

In its analysis, the Third Circuit acknowledged that it was governed by section 2254 (d) (1). App. 104. The Court further recognized and carefully applied the *Boyde* standard in determining whether the

jury instruction complied with *Mills*. App. 109. Under *Boyde*, a jury instruction fails to comply with *Mills* if there is a reasonable likelihood that the entire jury applied the instruction in an improper manner. *Boyde v. California*, 494 U.S. 370, 380 (1990).

Adhering to section 2254 (d) (1) standard and applying the principles of *Boyde* to Banks' *Mills* claim, the Third Circuit carefully examined the entire jury instruction. App. 110-111. The Court further examined the Pennsylvania Supreme Court's application of *Mills* to that instruction. The Third Circuit properly found from the record that the Pennsylvania Supreme Court never examined the entire jury instruction, but merely looked at one part of it and found that it was acceptable because it followed certain statutory provisions and did not "infer a requirement of unanimity. App. 109. The Third Circuit was correct in its conclusion that the Pennsylvania Supreme Court's application of Mills was unreasonable because it never examined the entire instruction nor did it question whether a reasonable jury could have concluded that unanimity was required to find mitigating evidence. App. 109.

In examining the jury instruction itself, those instructions, as the Third Circuit properly concluded, were ambiguous and allowed a jury to infer that unanimity was required for mitigating circumstances. App. 114-115. Those instructions repeatedly referenced "unanimity" in conjunction with "aggravating and mitigating circumstances" and specifically required the jurors to "agree" on their "findings". The instructions defined "findings" as including mitigating circumstances. App. 110-111, n.23.

In examining the *Mills* claim as to the verdict slip, the Third Circuit correctly found that the Pennsylvania Supreme Court unreasonably concluded that there was no *Mills* violation without ever examining the content and implications of the slip and without employing the proper inquiry. App. 119. That form suggests the need for jury unanimity on mitigating evidence and no additional language is employed implicating a differing standard for aggravating and mitigating evidence. App. 116-118.

Under these circumstances, the instructions and verdict slip do not pass the *Boyde* test and the decision of the Pennsylvania Supreme Court represents an unreasonable application of *Mills*.[5]

III. CONCLUSION

For the reasons set forth above, respondent respectfully requests that this Court deny the petition for writ of certiorari.

Albert J. Flora, Jr., Esq.
33 W. South Street
Wilkes-Barre, PA 18701
(570) 825-6592
Counsel for Respondent

[3] Because the Third Circuit held that Mills was not a new rule, it did not address whether Mills satisfies one of Teague's exceptions to non-retroactivity. Banks, 316 F.3d at 235 n. 5. Since one does not know how the Third Circuit would rule, Banks does not address that issue here, although he does not waive any argument regarding that issue.